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## **International Responsibility of Business for Violation of Human Rights – Customers’ Perspective<sup>1</sup>**

**Abstract:** This paper deals with possible avenues for enforcement liability of human rights violations that occur in less industrially developed countries. Since food, clothing and other economic goods are often produced in states where the rule of law may not be as effective as elsewhere, it is difficult to both establish and remedy the human rights violations that are frequently seen to occur in such states. Therefore, the paper analyses whether it would be possible to remedy human rights violations from abroad, in other words from within those states where these products are sold to end-users. The paper focuses on selected instruments of international, European and national law in order to establish whether a remedy for such violations is present. It takes the bottom-up principle, i.e. it concentrates on such instruments which might be used by individuals, consumers in particular, rather than by states. The outcome of the contribution is that, in theory, it is possible to hold retailers partially liable for human rights violations as a means of applying remote leverage on the manufacturers.

**Keywords:** human rights violations, UN Guiding Principles on Business and Human Rights, consumer protection, sweatshops, fair-trade, eco-label

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## 1. Introduction

Our world has been driven by globalisation for several decades. During this period we have witnessed the process of “making the world smaller”, the process of unification and the process of developing mutual dependences among states. One of the brighter sides of these processes is that the idea of human rights protection is becoming more and more widespread around the world. What was brought about by the Enlightenment in the 18<sup>th</sup> century as a novelty is now considered to be a standard throughout the continents. Or is it?

From a formal point of view, the protection of human rights has become well established in a plethora of declarations, conventions and acts of national law. The protection has gone so far that not only states are responsible for violations of human rights. The Guiding Principles on business and human rights, a document of the United Nations,<sup>2</sup> clearly requires business enterprises to comply with all applicable laws and, moreover, to respect human rights.

However, how does this legal framework work in practice? Is it really possible to make use of any of the declared rights and obligations?

This paper aims to elaborate on these questions. From the methodological point of view, the paper sets the general framework of the legal environment for addressing human rights violation by business entities. It then overpasses solutions that can be engaged by state authorities and tries to find some solutions from the bottom up, i.e. from the customers’ perspective in general.

The paper takes into account European Union (hereinafter EU) law, the protection of consumers in particular, in order to see whether it is possible to hold business enterprises responsible for violations of human rights through the prism of protection of consumers as the end-buyers of products. As EU consumer protection law is, in general, subject to directives, it is necessary to review national law as well. In this regard Slovak law is chosen as an example of national law implementing EU directives. Furthermore, public procurement as a purchasing process having a public authority as a specific buyer, is also analysed.

For the purposes of this paper, the broadest meaning of human rights is taken into account, including working conditions and living environment.

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2 Human Rights Council, Resolution adopted by the Human Rights Council 17/4 of 16 July 2011 – Human rights and transnational corporations and other business enterprises (A/HRC/RES/17/4), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf> (31.12.2018); Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises; J. Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf> (31.12.2018).

## 2. Responsibility of business entities for human right violations

The responsibility of business entities for human rights violations is broadly discussed in the literature.<sup>3</sup>

Currently there is no international treaty in force which confirms explicitly the duty of business entities to protect human rights or their responsibility for human

- 3 E.g. H. Van Der Wilt, Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities, "Chinese Journal of International Law" 2013, pp. 43-77; L. Catá Backer, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, "Columbia Human Rights Law Review" 2006, vol. 37(2), pp. 287-390; E. Pariotti, International Soft Law, Human Rights and Non-State Actors: Towards the Accountability of Transnational Corporations?, "Human Rights Review" 2009, vol. 10(2), pp. 139-155, <https://doi.org/10.1007/s12142-008-0104-0>; J. Nolan, Refining the Rules of the Game : The Corporate Responsibility to Respect Human Rights, "Utrecht Journal of International and European Law" 2014, vol. 30(78), pp. 7-23, <https://doi.org/http://dx.doi.org/10.5334/ujiel.ca>; D. Lustig, Three Paradigms of Corporate Responsibility in International Law: The Kiobel Moment, "Journal of International Criminal Justice" 2014; J. Letnar Čerňič, Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises, "Hanse Law Review" 2008, vol. 4(1), pp. 71-100, <http://hanselawreview.eu/wp-content/uploads/2016/08/Vol4No1Art05.pdf>; J. Letnar Čerňič, Corporate Responsibility for Human Rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, "Miskolc Journal of International Law" 2009, vol. 6(1), pp. 24-34, <http://ssrn.com/abstract=1459548>; D. Kinley and J. Tadaki, From Walk to Talk: The Emergence of Human Rights Responsibilities of Corporations at International Law, "Virginia Journal of International Law" 2004, vol. 44, pp. 931-1023, <https://ssrn.com/abstract=923360>; A. Grear and B.H. Weston, The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Landscape, "Human Rights Law Review" 2015, vol. 15(1), pp. 21-44, <https://doi.org/10.1093/hrlr/ngu044>; K. Buhmann, Regulating Corporate Social and Human Rights Responsibilities at the Un Plane: Institutionalising New Forms of Law and Law-Making Approaches?, "Nordic Journal of International Law" 2009; E. De Brabandere, Non-State Actors, State-Centrism and Human Rights Obligations, "Leiden Journal of International Law" 2009, vol. 22(1), pp. 191-209; A. Clapham and S. Jerbi, Categories of Corporate Complicity in Human Rights Abuses, "Hastings International and Comparative Law Review" 2001, vol. 24, pp. 339-349; E.C. Chaffee, The Origins of Corporate Social Responsibility, "University of Cincinnati Law Review" 2017, vol. 85, pp. 347-373, <https://ssrn.com/abstract=2957820>; International Commission of Jurists, Corporate Complicity & Legal Accountability: Civil Remedies 2008, vol. 3, p. 72; J.G. Ku, The Limits of Corporate Rights Under International Law, "Chicago Journal of International Law" 2012, vol. 12(2), pp. 729-754, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1627&context=cjil>; A. McBeth, Crushed By An Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector, "Yale Human Rights and Development Law Journal" 2014, vol. 11(1), pp. 127-166; S. Michalowski, No Complicity Liability for Funding Gross Human Rights Violations ?, "Berkeley Journal of International Law" 2012, vol. 30(2), pp. 451-524; J. Nolan, Corporate Accountability and Triple Bottom Line Reporting : Determining the Material Issues for Disclosure, "Enhancing Corporate Accountability: Prospects and Challenges" 2006, pp. 181-210; J. Nolan and L. Taylor, Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?, "Journal of Business Ethics" 2009, vol. 87(2), pp. 433-451, <https://doi.org/10.1007/s10551-009-0295-6>.

rights violations. Arguments in favour of a duty to obey human rights rely on the Universal Declaration of Human Rights of 1948 (hereinafter Declaration). These arguments can be split into two groups: arguments on the direct definition of responsibility and arguments on rights without finding responsible subjects.

First, under the preamble of the Declaration “*THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind*” and here the notion “every organ of society”, can be read also as private legal persons, including business entities. Second, the importance of the preamble is stressed since in two provisions the state is mentioned as the addressee of duties (Art. 16 and Art. 22 of the Declaration) which call for specific responsibility. Furthermore, reference to the preamble was used in drafting the principles of responsibility of transnational corporations.<sup>4</sup> Moreover, Art. 29 of the Declaration specifies that “*Everyone has duties to the community in which alone the free and full development of his personality is possible*” and the duty covers state and non-state subjects as well. Finally, Art. 30 stipulates that “*Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein*” and thus accepts that subjects other than states have to follow the declaration.<sup>5</sup>

Secondly, the approach to interpretation of the Universal Declaration of Human Rights considers it a list of the rights of human beings without defining persons responsible for the protection and non-violation of these rights. Hence the declaration endorses rights *erga omnes*. McBeth also sees confirmation of these *erga omnes* effects in the preamble (rights must be respected by every individual, every organ of society).<sup>6</sup>

Since corporations always act through their owners, directors or employees, there are different concepts of how to attribute responsibility for acts of natural persons in relation to legal persons: (1) vicarious liability; (2) alter ego liability; (3) *respondeat superior*; (4) failure of management/control/surveillance.

From the point of view of human rights violations several forms of business involvement can occur: direct violation, indirect violation by direct complicity, indirect complicity, tacit complicity or providing financial assistance. Direct

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4 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

5 D. Kinley, J. Tadaki, *From Walk to Talk...*, *op. cit.*, pp. 948-949.

6 A. McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights*, “*Hamline Journal of Public Law and Policy*” 2008, vol. 30(1), p. 42.

violation occurs when the business entity is the main perpetrator of the violation, e.g. looting or exploitation of assets or resources in a war zone or other place of conflict, use of slave labour from or in detention camps. Indirect violation occurs when a direct perpetrator violates human rights and a business entity provides certain support or other benefits, regardless of whether or not the direct perpetrator is deemed liable. Direct complicity covers situations where a business entity provides the means or tools to commit violations (e.g. providing materials to make prohibited chemical weapons, selling software designed to facilitate civil repression). Indirect complicity addresses situations where a business benefits from human rights violations (e.g. via the repression or relocation of local inhabitants to acquire access to raw resources or infrastructure). Tacit complicity is closely linked to corporate governance and makes enterprises liable for “remaining silent” on human rights violations, particularly in host countries. Finally, businesses can be considered complicit by the existence of business links, by providing finance or other assistance to keep a regime in place that is violating human rights, or by buying goods originating from processes related to human rights violations.

The majority of large scale violations reported that are attributable to business entities and which typically involve the abuse of workers’ rights and human rights in general via environmental damage, relate to the extraction of mineral resources (i.e. the oil, gas and mining industries).<sup>7</sup>

However, from the consumer’s point of view, agriculture and the food industry are the most sensitive areas and grave violations of human rights attributable to food producers<sup>8</sup> has led to consumer boycotts.<sup>9</sup>

Similarly, the mass production of other consumer products, particularly textiles, and the so-called “sweatshops” in which they are produced, have also

7 See e.g. cases *John Doe I, et al., v. UNOCAL Corp., et al.*, 395 F.3d 932 (9 Cir. 2002), *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), *JOHN DOE I, et al v. EXXON MOBIL CORP, et al.*, 1:01-cv-01357, No. 455 (D.D.C. Sep. 24, 2014), *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 No. 1:07-cv-01022, No. 1:01-cv-01357, (D.C. Cir. Jul. 8, 2011).

8 See e.g. *John Doe I v. Nestle, USA*, 10-56739 (9th Cir. 2014).

9 See e.g. K. Sikink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/ UNICEF Code*, “Review Literature and Arts of the Americas” 1986, vol. 40(4), pp. 815–840; W.H. Meyer, *Activism and Research on TNCs and Human Rights: Building a New International Normative Regime*, (in:) J.G. Frynas and S. Pegg (eds.), *Transnational Corporations and Human Rights*, Palgrave Macmillan, Houndmills, New York 2003), pp. 33–52; A. Wawryk, *Regulating Transnational Corporations through Corporate Codes of Conduct*, (in:) J.G. Frynas and S. Pegg (eds.), *Transnational Corporations...*, *op. cit.*, pp. 53–78.

been targeted by human rights activists, consumers and politicians;<sup>10</sup> more so after the Rana Plaza disaster.<sup>11</sup>

### **3. UN Guiding Principles and current attempts to introduce international accountability of businesses for violation of human rights**

The basic avenue for enforcement of human rights in a particular country is via the claims of addressees of these rights to local enforcement bodies (administrative offices and courts). However, this approach cannot be seen to be effective in cases where local governments are not in the least bit focused on human rights protection or are themselves heavily and systematically engaged in such violations. The paper limits itself to such regulatory mechanisms which are reachable by individuals rather than by states. Apart from national and European rules, the UN Guiding Principles on Business and Human Rights 2011<sup>12</sup> (hereinafter Guiding Principles) are analysed. The analysis seeks to answer two questions: first, is there a substantive legal background for a possible challenge? Second, who has legal standing for such challenge?

The Guiding Principles are divided into three pillars. The first pillar deals with the state's duty to protect human rights, the second pillar focuses on corporate responsibility to respect human rights and the third pillar sets out the principles related to access to remedy.

Regarding the first pillar, it is important to see whether there is a principle which would oblige a state to protect against human rights violations which occur outside

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- 10 For further details see e.g. T.A. Hemphill and G.O. White, The World Economic Forum and Nike: Emerging "Shared Responsibility" and Institutional Control Models for Achieving a Socially Responsible Global Supply Chain?, "Business and Human Rights Journal" 2016, vol. 1(2), pp. 307-313, <https://doi.org/10.1017/bhj.2016.3>; J. Nolan, With Power Comes Responsibility: Human Rights and Corporate Accountability, "University of New South Wales Law Journal" 2005, vol. 28(3), pp. 581-613; J. Nolan and L. Taylor, Corporate Responsibility..., *op. cit.*; B. Dubach and M.T. MacHado, The Importance of Stakeholder Engagement in the Corporate Responsibility to Respect Human Rights, "International Review of the Red Cross" 2012, vol. 94(887), pp. 1047-1068, <https://doi.org/10.1017/S1816383113000404>; D. Davitti, Refining the Protect, Respect and Remedy Framework for Business and Human Rights and Its Guiding Principles, "Human Rights Law Review" 2016, vol. 16(1), pp. 55-75, <https://doi.org/10.1093/hrlr/ngv037>; A. Kolk and R. van Tulder, Setting New Global Rules? TNCs and Codes of Conduct, "Transnational Corporations" 2005, vol. 14(3), pp. 1-27, <https://doi.org/10.1177/0007650309343407>; A. Kolk and R. van Tulder, *International Codes Of Conduct Trends, Sectors, Issues and Effectiveness*, 2002, [www.fbk.eur.nl/DPT/VG8](http://www.fbk.eur.nl/DPT/VG8).
  - 11 M. Aizawa and S. Tripathi, Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers, "Business and Human Rights Journal" 2016, vol. 1(1), pp. 145-151, <https://doi.org/10.1017/bhj.2015.12>; J. Nolan, With Power..., *op. cit.*
  - 12 Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, Guiding Principles..., *op. cit.*



its territory<sup>13</sup> but where the product derived from such violations ends up within it. In the case of a state authority doing business with an enterprise, the state should promote respect for human rights in terms of contracts.<sup>14</sup> However, it would be a rare event for a state to be entering into a contract to buy, say clothes, directly from an enterprise manufacturing them in an Asian country.

The Guiding Principles provide for extra-territorial involvement in cases of abuse of human rights in conflict-affected areas.<sup>15</sup> States should help ensure that business enterprises operating in those contexts are not involved with such abuses. However, as it flows from the commentary to this principle, it applies to transnational corporations, which is a limiting factor, together with the requirement of the place of production being in a conflict zone.

Regarding corporate responsibility pursuant to the Guiding Principles, requirements are mainly towards an enterprise's own behaviour.<sup>16</sup> However, Foundation Principle 13<sup>17</sup> states that enterprises should try to prevent or at least mitigate human rights violations which are directly linked to its operations. It can be derived from this principle that even if an enterprise itself does not breach human

13 UN Guiding Principles, I. The State Duty to Protect Human Rights, Foundation Principle 1. *States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.* However, this principle is not directly addressed to third states.

14 UN Guiding Principles, I. The State Duty to Protect Human Rights, Operational Principle 6. *States should promote respect for human rights by business enterprises with which they conduct commercial transactions.*

15 UN Guiding Principles, I. The State Duty to Protect Human Rights, Operational Principle 7. *Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.*

16 UN Guiding Principles, I. The corporate responsibility to respect human rights, Foundation Principle 11. *Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*

17 UN Guiding Principles, I. The corporate responsibility to respect human rights, Foundation Principle 13. *The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*

rights, but they are breached by its business partners, the enterprise should not turn a blind eye to this. The action required from an enterprise depends on its leverage over the entity violating human rights, how crucial the business relationship with that entity is to the enterprise, the severity of the violation and whether terminating the relationship with the entity would generate negative human rights consequences.<sup>18</sup> The enterprise should also verify the effectiveness of the action.<sup>19</sup>

Guiding Principles 16 *et seq.* provides for particular commitments which should be met by enterprises.

Regarding the third pillar, access to remedy, states are obliged to provide judicial and other means in order to secure a remedy.<sup>20</sup> However, this duty to act applies only to the state's territory or jurisdiction.

Moreover, in relation to the real impact of the Guiding Principles, it is important to say that they apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.<sup>21</sup> However, the Guiding Principles are not binding. They are implemented into national legal orders via national action plans. However, many states have thus far not adopted such plans, Slovakia included.<sup>22</sup> The EU has partially implemented the Guiding Principles, for example by the amendment of Directive 2013/34/EU<sup>23</sup> which incorporates an obligation to issue a non-financial statement for undertakings which are public-interest entities having 500 or more employees.<sup>24</sup> Nevertheless, this obligation is still very limited and does not provide a solution to the problem as a whole.

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18 UN Guiding Principles, I. The corporate responsibility to respect human rights, Operational Principle 19, Commentary.

19 UN Guiding Principles, I. The corporate responsibility to respect human rights, Operational Principle 20. *In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should: (a) Be based on appropriate qualitative and quantitative indicators; (b) Draw on feedback from both internal and external sources, including affected stakeholders.*

20 UN Guiding Principles, I. Access to Remedy, Foundation Principle 25. *As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*

21 UN Guiding Principles, p. 1.

22 UN Human Rights, Office of the High Commissioner: State national action plans on Business and Human Rights. Available at: <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (27.12.2018).

23 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (hereinafter referred as "Directive 2013/34/EU").

24 A. Yilmaz and R. Chambers, New EU Human Rights Reporting Requirements for Companies: One Step beyond the Current UK Rules, EU Law Analysis, 2014, <http://eulawanalysis.blogspot.com/2014/10/new-eu-human-rights-reporting.html>.



Therefore, when it comes to the legal standing of individuals, the Guiding Principles do not provide a legal basis for judicial proceedings. The Guiding Principles are merely a soft law instrument<sup>25</sup> and its true impact, especially when it comes to corporate responsibility to respect human rights, remains questionable.<sup>26</sup>

Being aware of the legal weakness of the Guiding Principles, in 2014 the UN Human Rights Council endorsed a resolution establishing a working group to prepare a draft legally binding international treaty dealing with the responsibility of businesses in relation to human rights violation.<sup>27</sup> This approach divided the Human Rights Council<sup>28</sup> itself as well as academia,<sup>29</sup> nevertheless, in July 2018 the “Zero Draft”<sup>30</sup> was submitted to the Human Rights Council for consideration.

Attempts to introduce an international instrument confirming the legal responsibility of businesses for human rights violations is not the only tool developed by the UN to regulate business activities. From the initiative of the then UN Secretary-General Kofi Annan, the UN Global Compact (hereinafter GC) was launched in 2000. Although the GC lists ten principles<sup>31</sup> the legal concept is completely different.

25 J.G. Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474236](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474236) (27.12.2018), p. 6.

26 C.M. O'Brien, S. Dhanarajan, *The Corporate Responsibility to Respect Human Rights: A Status Review*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2607888](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607888) (27.12.2018), pp. 19, 20.

27 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9

28 The resolution was adopted by 20 votes in favour (Algeria, Benin, Burkina Faso, China, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam) 14 members voted against (Austria, Czechia, Estonia, France, Germany, Ireland, Japan, Montenegro, Korea, Romania, FYROM, UK and USA) and 13 members abstained (Argentina, Botswana, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE).

29 See e.g. M.K. Addo, *The Reality...*, *op. cit.*; J. Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, Institute for Human Rights and Business, 2014, <https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre/>; O. De Schutter, *Towards a New Treaty on Business and Human Rights*, “Business and Human Rights Journal” 2016, vol. 1(1), pp. 41–67, <https://doi.org/10.1017/bhj.2015.5>; J. Nolan, *The Corporate Responsibility...*, *op. cit.*; D. Bilchitz, *The Necessity for a Business and Human Rights Treaty*, “Business and Human Rights Journal” 2016, vol. 1(2), pp. 203–227, <https://doi.org/10.1017/bhj.2016.13>.

30 Legally Binding Instrument to Regulate, in *International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (30.09.2018).

31 (Principle 1) Businesses should support and respect the protection of internationally proclaimed human rights; and (Principle 2) make sure that they are not complicit in human rights abuses. (Principle 3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; (Principle 4) the elimination of all forms of forced and compulsory labour; (Principle 5) the effective abolition of child labour; and (Principle 6) the elimination of discrimination in respect of employment and occupation. (Principle 7) Businesses

These principles are not authoritatively imposed as rules on business entities, rather they are adopted and adhered to voluntarily. Enterprises that join the initiative are required to incorporate the GC in their business strategy and submit annual reports on its implementation and effect.<sup>32</sup> The so-called “integrity measures” attached to the GC can be considered the initiative’s enforcement mechanism which guards against abuse of UN principles in general and the principles of the GC in particular, such as failure in submitting reports and grave or systematic violation of the principles themselves. Where a violation occurs two forms of sanction can be imposed: (1) labelling the business as “non-communicating” or “non-active”; (2) de-listing the business from the GC initiative.<sup>33</sup> It should be noted that this enforcement mechanism is quite active: currently ca. 9,700 businesses participate in the initiative and ca.7,500 entities have thus far been de-listed.<sup>34</sup>

#### 4. Voluntary codes and customers’ perspective

Adhering to the GC is a form of self-regulation whereby a business entity voluntarily follows certain standards and it is irrelevant as to whether or not such standards are laid down by a public authority. Even accepting the principle of a “code of conduct” can produce a different market effect. The declaration of accepting or respecting a certain code of conduct can be an act of pure altruism but it is also sends an important message to investors,<sup>35</sup> shareholders, business partners, public sector, employees and customers, and thus it produces legal effects.<sup>36</sup> Following certain codes of conduct or standards of social and environmental protection can be required or expected by consumers and can be an important criterion in purchase decisions. On the basis of a Eurobarometer survey, 32% of Europeans (from 70% in Sweden to 12% in Portugal) answered that “ecolabels” play an important role in their decision making, however, on the other hand 39% of Europeans (from 6% in Sweden to 64%

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should support a precautionary approach to environmental challenges; (Principle 8) undertake initiatives to promote greater environmental responsibility; and (Principle 9) encourage the development and diffusion of environmentally friendly technologies. (Principle 10) Businesses should work against corruption in all its forms, including extortion and bribery.

32 United Nations, Business Application, [https://www.unglobalcompact.org/HowToParticipate/How\\_to\\_Apply\\_Business.html](https://www.unglobalcompact.org/HowToParticipate/How_to_Apply_Business.html) (31.12.2018).

33 United Nations Global Compact, Note on Integrity Measures, 2010, [https://www.unglobalcompact.org/docs/about\\_the\\_gc/Integrity\\_measures/Integrity\\_Measures\\_Note\\_EN.pdf](https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf).

34 United Nations Global Compact, Note on Integrity Measures, 2010, [https://www.unglobalcompact.org/docs/about\\_the\\_gc/Integrity\\_measures/Integrity\\_Measures\\_Note\\_EN.pdf](https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf).

35 J.J. Janney, G. Dess and V. Forlani, Glass Houses? Market Reactions to Firms Joining the UN Global Compact, “Journal of Business Ethics” 2009, vol. 90(3), p. 407, <https://doi.org/10.1007/s10551-009-0052-x>.

36 D. Kinley and J. Tadaki, From Walk to Talk..., *op. cit.*

in Portugal) never take notice of labels.<sup>37</sup> Another question related to the reliability of such labels. According the same survey, only 24% of Europeans (from 54% in Cyprus to 9% in France) totally agree that “eco-labelled” products are really eco-friendly, while 54% tended to agree to such effect.<sup>38</sup> As for the survey on the relevance of labels on textile products, labels related to social aspects of their manufacture are less important than environmental issues.<sup>39</sup> 17% of Europeans were prepared pay over 10% more for product produced under adequate working conditions, 24% were prepared to pay up to 10% more and 43% said they would chose “worker-friendly” products but only if the price was the same.<sup>40</sup> However these results did not correspond with the respondents views on “social” labels – only 12% always take them into account, 33% sometimes take them into account and 40% either never take them into account or admitted that working conditions were of no concern to them.<sup>41</sup> The most common reason for this is that consumers rarely encounter labels of this kind even though they would have a preference for social-friendly products (ca. 80%) and up to 40% stated that they did not trust such labels.<sup>42</sup>

As the aforementioned surveys illustrate, ecolabels and social labels play a certain role in the decision making process of consumers even though they are not always trusted. Therefore the analysis which follows focuses on consumer law and, in particular, how labelling or declarations of business to consumers regarding environmental and social policies are considered in relation to protecting consumers against misleading advertisements and information. Furthermore, public bodies as a specific type of consumer will be looked into because, theoretically, it is they who by requiring products to be provided bearing such labels can push businesses to improve ecological and social standards within their respective manufacturing and supply chains.

## 5. EU consumer protection

EU Consumer Protection Law is established in directives and spread in many pieces of legislation, however, for the purposes of this paper it can be summarised as following.

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37 European Commission, *Special Eurobarometer 468 Report Attitudes of European Citizens towards the Environment*, 2017, <http://ec.europa.eu/commfrontoffice/publicopinion>, p. 30.

38 Ibid, p. 31.

39 Matrix Insight, *Study of the Need and Options for the Harmonisation of the Labelling of Textile and Clothing Products*, 2013, p. 7.

40 Ibid, p. 81.

41 Ibid, p. 82.

42 Ibid.

First, pursuant to Directive 2011/83/EU,<sup>43</sup> consumers are entitled to several rights, particularly the right to information and the right to withdrawal in relation to certain types of contracts. However, the main goal of this Directive is to facilitate trade within the internal market.<sup>44</sup> The right of consumers to have the products they buy manufactured in a way compatible with human rights protection is not among the rights explicitly enumerated in the Directive.

Yet, there are provisions which might be interpreted in such a way as to incorporate information on the compliance of the production procedure with human rights. Article 5 of Directive 2011/83/EU, provides for information requirements for contracts other than distance or off-premises contracts, i.e. for contracts where a consumer buys goods from a brick and mortar store. Article 6 of Directive 2011/83/EU covers information requirements for distance and off-premises contracts. Under both articles, the trader is obliged to provide information on the main characteristics of the goods, to an appropriate extent and in a clear and comprehensible manner.<sup>45</sup> It might be claimed that the production process of say an item of clothing, produced in a manufacturing environment that is respectful of human rights, qualifies as a main characteristics of the goods. Nevertheless, there is no recital to suggest such interpretation.

As to legal standing, Directive 2011/83/EU expressly states that an action under national law before a court or before a competent administrative body may be taken by consumer organisations having a legitimate interest in protecting consumers.<sup>46</sup> The action shall ensure that the national provisions transposing Directive 2011/83/EU are applied.

Second, Directive 2005/29/EC<sup>47</sup> provides for the specification of such contractual provisions which are to be considered as unfair. The aim of Directive 2005/29/EC is again protection of the internal market as well as the protection of consumers.<sup>48</sup>

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43 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (hereinafter referred to as: "Directive 2011/83/EU") (OJ L 304, 22.11.2011, pp. 64–88).

44 See, for instance, Directive 2011/83/EU, recital 6.

45 Article 5 para 1 p. a) and Article 6 para 1 p. a) of Directive 2011/83/EU.

46 Article 23 para 2 p. b) and Article 6 para 1 p. a) of Directive 2011/83/EU.

47 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (hereinafter referred to as "Directive 2005/29/EC") (OJ L 149, 11.06.2005, pp. 22–39).

48 Directive 2005/29/EC, recital 23, Article 1.

Similarly to Directive 2011/83/EU, there is no explicit right to have products manufactured in a way compatible with human rights protection.

Unfair commercial practices are defined in Article 5 of Directive 2005/29/EC. In essence, in order for commercial practices to be considered unfair, they must meet two requirements: first, they are contrary to the requirements of professional diligence; second, they distort the economic behaviour of average consumers. The two main groups of unfair commercial practices are misleading practices<sup>49</sup> and aggressive practices<sup>50</sup>. We will focus on the former.

Misleading practices can be addressed by Directive 2005/29/EC in cases where traders:

- mislead consumers by falsely claiming that products are manufactured in a human-friendly manner when they are not;<sup>51</sup>
- mislead consumers by falsely claiming that they are committed to the observance of human rights in their business relations when they are not;<sup>52</sup>
- mislead consumers by adopting codes of conduct that require them to observe human rights in their business relations but do not comply with such codes;<sup>53</sup>
- do not provide “*material information*<sup>54</sup> that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise”.<sup>55</sup> Although this does not directly flow from recitals, the provision might be interpreted as to included omission to state whether products they sell were manufactured in compliance with human right standards;

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49 A commercial practice is misleading, in essence, if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives, and it causes or is likely to cause consumer to take a transactional decision that he would not have taken otherwise. See Article 6 para 1 of Directive 2005/29/EC.

50 A commercial practice is aggressive, in essence, if by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs the consumer's freedom of choice or and thereby causes him or to take a transactional decision that he would not have taken otherwise. See Article 8 of Directive 2005/29/EC.

51 Such statement might be subsumed under Article 6 para 1 p. a) of Directive 2005/29/EC – the nature of the product.

52 Such statement might be subsumed under Article 6 para 1 p. c) of Directive 2005/29/EC – the extent of the trader's commitments.

53 Such statement might be subsumed under Article 6 para 2 p. b) of Directive 2005/29/EC – non-compliance with codes of conduct. See also Annex I p. 1 of Directive 2005/29/EC. Annex I which enumerates commercial practices which are in all circumstances considered unfair.

54 The enumeration of material information in relation to invitation to purchase is provided by Article 7 para 4 of Directive 2005/29/EC.

55 Article 7 para 1 of Directive 2005/29/EC.

- fail to provide clear or timely information described in the previous point.<sup>56</sup>

Regarding legal standing, Article 11 of Directive 2005/29/EC secures the right to take legal action against unfair commercial practices for persons or organisations having a legitimate interest in combating unfair commercial practices, including competitors. Consumers shall be included in this group.

## 6. Slovak consumer protection

As stated above, directives are subject to national implementation. In the Slovak legal order, there are several pieces of legislation which protect consumers. Act No. 250/2007 Coll. (hereinafter Act on consumer protection)<sup>57</sup> enumerates various rights of consumers, among which there is the right to buy products that meet a specific standard of quality.<sup>58</sup> If the quality is not prescribed, traders may sell products of a lesser standard of quality but only if consumers are made clearly aware of the differences before purchase.<sup>59</sup> We assume this right might be interpreted in such a way as to enable consumers to buy products which are manufactured without infringing human rights. However, there is nothing in the Act on consumer protection which would directly require such interpretation.

Apart from enumerated rights, traders are obliged to maintain certain ethical standards. For example, Article 4 (8) of the Act on consumer protection provides that *“The seller must not act contrary to good moral behaviour, (...) conduct contrary to such behaviour means, in particular, conduct which is contrary to established traditions and which show obvious signs of discrimination or deviation from the rules of moral integrity recognised in the sale of the product and the provision of the service, or which might [as a result of misleading information on the part of the seller] cause harm to the consumer (...)”*<sup>60</sup> Thus, if the sale of goods manufactured in a way that breaches human rights is considered to be contrary to good moral behaviour, pursuant to Article 4 of the Act on consumer protection, such sale would be prohibited. However, nothing in this Act directly indicates that the provision should be triggered in the situation described.

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56 Such statement might be subsumed under Article 7 para 2 of Directive 2005/29/EC.

57 Act No. 250/2007 Coll. on protection of consumers, as amended, hereinafter referred as “Act on consumer protection” (Zákon č. 250/2007 Z.z. o ochrane spotrebiteľa a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov), [https://www.slovlex.sk/static/pdf/2007/250/ZZ\\_2007\\_250\\_20190101.pdf](https://www.slovlex.sk/static/pdf/2007/250/ZZ_2007_250_20190101.pdf) (1.01.2019).

58 Section 3 para 1 of the Act on consumer protection.

59 Section 4 para 1 p. a) of the Act on consumer protection.

60 Section 4 para 8 of the Act on consumer protection.



Unfair commercial practices are regulated in a similar manner as indicated above in relation to Directive 2005/29/EC.<sup>61</sup> Therefore, we referred to the elaboration on misleading practices presented above. The same applies to the obligation to provide information presented in relation to Directive 2011/38/EU.<sup>62</sup>

As far as legal standing is concerned, any consumer may challenge a violation of his or her rights before a court.<sup>63</sup> The same rights are given to legal persons protecting the rights of consumers.<sup>64</sup>

Apart from the Act on consumer protection, consumers are significantly protected by the Civil Code.<sup>65</sup> Section 53 of the Civil Code holds unfair contractual terms null and void, unless they are a derivative of negotiation. If a consumer contract contains a provision which is an unfair contractual term and in conclusion of the contract an unfair commercial practice was used, such contract is *ipso lege* null and void.<sup>66</sup> Section 53 also provides a non-exhaustive list of unfair terms, however, none of these terms is directly applicable to the issue at hand.<sup>67</sup>

None the less, if there is a contractual term that infers, e.g. that the trader is not obliged to explore the process of garment production and its compatibility with human rights, and such contractual term is declared unfair by a court, the trader is obliged not to use such term or a term with similar meaning in dealings with consumers.<sup>68</sup>

As to legal standing, consumers are entitled to lodge an action to a competent court in order to establish that a particular contractual term is unfair. There are no specific procedural provisions within the relevant section of the Civil Code. The litigation process would be governed by the Civil Procedural Code.<sup>69</sup>

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61 For the exact implementation of the relevant provisions from Directive 2005/29/EC, see section 7 et seq. of the Act on consumer protection.

62 For the exact implementation of the relevant provisions from Directive 2011/38/EU, see section 10a et seq. of the Act on consumer protection.

63 Section 3 para 5 of the Act on consumer protection.

64 Ibid.

65 Act No. 40/1964 Coll. Civil Code, as amended (Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov), hereinafter referred as "Civil Code", [https://www.slov-lex.sk/static/pdf/1964/40/ZZ\\_1964\\_40\\_20190130.pdf](https://www.slov-lex.sk/static/pdf/1964/40/ZZ_1964_40_20190130.pdf) (30.01.2019). Please kindly note that there are also other Acts of Law which protect consumers, however, they are deliberately omitted from this paper, such as protection of consumers in off-premise sales, or protection of consumers in financial relations.

66 Section 53d of the Civil Code.

67 However, an interpretation for the benefit of consumer is always used when a provision is ambiguous.

68 Section 53a para 1 of the Civil Code.

69 Act No. 160/2015 Coll. Civil Procedural Code, as amended (Zákon č. 160/2015 Z.z. Civilný sporový poriadok v znení neskorších predpisov), [https://www.slov-lex.sk/static/pdf/2015/160/ZZ\\_2015\\_160\\_20181212.pdf](https://www.slov-lex.sk/static/pdf/2015/160/ZZ_2015_160_20181212.pdf) (12.12.2018).

## 7. Selected examples of consumer protection case law

The case *Kasky v. Nike* was brought by an anti-sweatshop activist against the communication of a transnational corporation on working conditions in its factories.<sup>70</sup> This case was, however settled out of court, and both parties considered denial of *certiorari* by the US Supreme Court as their victory. Although the case started as a consumer protection case based on alleged false information provided by Nike regarding working conditions in its factories and level of wages paid, the crucial legal question taken into consideration by the Supreme Court of California revolved around the extent of institutional freedom of speech.

Although there is no current case law of the Court of Justice of the European Union (hereinafter CJEU) dealing directly with the misuse of labels on the environmental and social aspects of advertising, certain standards of assessment can be identified.

In the *Bankia* case the CJEU<sup>71</sup> stressed that the difference between unfair commercial practices and unfair contractual terms, is that unfair contractual terms are *per se* “not binding on the consumer”, while unfair commercial practices are “merely” prohibited.<sup>72</sup> Finding that a commercial practice is unfair has no direct effect on whether the contract is valid.<sup>73</sup> Therefore, even though the court finds that a certain practice was “misleading”, i.e. it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, it is only one of the elements involved in evaluating unfairness of a contractual term and nullity of it.<sup>74</sup>

Therefore wrongly stated or abused eco-labels and social labels do not automatically cause nullity of the contract. It must also be reminded that eco-labels as well as social labels do not generally declare the quality of the product, merely the conditions involved in its manufacture. Hence, in this sense, a consumer can hardly claim injury, loss or other damage caused by a falsely labelled or advertised product.

Also in the *Bankia* case the CJEU limited the relevance of codes of conduct: “the directive does not require the Member States to provide for there to be direct consequences for traders solely on the ground that they have not complied with a code of conduct after subscribing thereto” and therefore the Member States are not obliged to introduce legislation which “confer a legally binding nature on a code of conduct”.<sup>75</sup>

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70 J. Fisher, Free Speech to Have Sweatshops? How *Kasky v. Nike* Might Provide a Useful Tool to Improve Sweatshop Conditions, “Boston College Third World Law Journal” 2006, vol. 26(2), pp. 267–310, <http://lawdigitalcommons.bc.edu/twlj/>.

71 Judgment of 19 September 2018, *Bankia*, C-109/17, EU:C:2018:735.

72 *Ibid.*, para. 37,41.

73 *Ibid.*, para. 50.

74 Judgment of 15 March 2012, *Pereničová and Perenič*, C453/10, EU:C:2012:144, para. 46, 47.

75 *Supra* note 70, para. 58, 59.

## 8. Public procurement and environmental and social standards

Directive 2014/24/EU on public procurement (hereinafter Public Sector Directive),<sup>76</sup> included some provisions that enabled measures concerning environmental, social and labour issues to be addressed. First, according to its Article 18(2) “*Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X*”. Second, under Article 56(1) “*Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)*”. Third, under Article 57(4)(a) “*Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator (...) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)*”. Fourth, the Contracting authority shall require explanation of abnormally low tenders, particularly in relation to, inter alia, compliance with obligation referred to in Article 18(2). The difference between these provisions of the Public Sector Directive is apparent: Article 18(2) constitutes a mandatory duty of the Member State; however it does not provide a certain form of transposition of this duty, and Articles 56(1), 57(4)(a) and 69(2)(d) enable contracting authorities to enforce requirements laid down by Article 18(2), however this provision of the directive is optional or merely “enabling”.

As case law has shown these provisions do not establish an unlimited eco-friendly and social-friendly framework for public procurement, it only allows some of these features to be considered. These limits were explained in case *Commission v. Netherlands*<sup>77</sup> in which the CJEU declared incompatible with the directive explicit requirements established by the contracting authority that included: a technical specification “requiring that certain products to be supplied were to bear a specific ecolabel, rather than using detailed specifications” and a minimum level of technical ability “that tenderers comply with the ‘criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’”. Further, the court found that the requirements for tenderers to “comply with ‘the criteria of sustainable purchasing and socially responsible business’ and to state how they comply with those

76 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.03.2014, pp. 65–242).

77 Judgment of 10 May 2012, *Commission v. Netherlands*, C-368/10, EU:C:2012:284.

criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’<sup>78</sup> were insufficiently clear and precise and did not comply with the obligation of transparency provided for in Article 2 of the Directive. Hence the list of international instruments included in Annex X constitutes an exhaustive list of the social standards that can be considered in public procurement.

The CJEU also faced the question of whether a contracting authority may require certain labour standards for the workers of a tenderer. Although the court confirmed that it is permissible to require that an equal wage be paid to all workers employed on a specific contract, in *Rüffert*<sup>79</sup> and in *Bundesdruckerei*,<sup>80</sup> it did not allow to require a minimum wage to be set by collective agreement. However, in *RegioPost* it allowed to require the statutory minimum wage to be paid by contractors as well as subcontractors.<sup>81</sup>

The final part of this chapter will review how the provisions of Directive 2014/24/EU were transposed into the Slovak legal order, i.e. into Act No 343/2015 Coll. on Public Procurement and Amendment of Certain Laws as amended (hereinafter Public Procurement Act).<sup>82</sup> First, a valuable tool is enshrined in this Act in relation to the prequalification requirements for economic operators wishing to participate in public tenders. Under its Article 32(1g), a prospective tenderer shall fulfil the prequalification criterion if, *inter alia*, within the three year period preceding the call for bids or launch of the procurement procedure the operator “*has not committed a serious breach of obligations in the field of environmental protection, social law or labour law (...) for which a sanction has been lawfully imposed which the contracting authority can prove*”. Slovak legislation thus joins the enforcement of Article 18(2) of the Public Sector Directive and exclusion criteria and does not refer to an exhaustive list of environmental, social and labour regulations. The Act itself does not explain the notion “serious violation” and the Office for Public Procurement was asked to provide such explanation by way of “methodological guidance”. However, in its Methodological Guidance No. 16013-5000/2017 of 6 November 2017,<sup>83</sup> the Office did not provide an explanation which would have defined which labour, environmental and social rules are relevant for exclusion from public procurement. In Decision No. 1838-9000/2014-KR/10 of 3 April 2014 the Council of the Office for Public Procurement (appellate body) confirmed that only a grave violation can establish

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78 Judgment of 10 May 2012, *Commission v. Netherlands*, C-368/10, EU:C:2012:284, operative part.

79 Judgment of 3 April 2008, *Rüffert*, C-346/06, EU:C:2008:189.

80 Judgment of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235.

81 Judgment of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760.

82 Zákon č. 3434/2015 Z.z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov, [https://www.slov-lex.sk/static/pdf/2015/343/ZZ\\_2015\\_343\\_20190101.pdf](https://www.slov-lex.sk/static/pdf/2015/343/ZZ_2015_343_20190101.pdf) (1.01.2019).

83 Available at: <https://www.uvo.gov.sk/metodicke-usbmerenia-zakon-c-3432015-z-z/document/428662> (31.12.2018).

reason for exclusion of an operator from public procurement and the gravity of the violation can be derived from the circumstances of the case and its outcome, e.g. the level of fine imposed.<sup>84</sup>

Another tool for reviewing human rights standards is the examination of abnormally low bids. Under Article 53(2)d) of the Public Procurement Act, the commission for evaluation of bids shall ask for an explanation of an abnormally low bid, *inter alia*, from the point of view of the fulfilment of statutory obligations laid down by labour law, in particular with regard to minimum wage entitlements, environmental protection and social rights under special regulations.

Reserved contracts to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, is a tool for protecting the rights of a specific group of workers and is provided for in Article 20 of the Public Sector Directive as well as in Slovak legislation. The Supreme Court of the Slovak Republic in judgment No 4Sžf/67/2015 of 4 November 2015,<sup>85</sup> warned against abuse of this provision. On the one hand it admitted that no economic activity can be excluded *per se* from reserved contracts to sheltered workshops (including construction work). On the other hand, the aim of this legislation is to provide contracts to sheltered workshops and the service is in fact performed by sub-contractors.

## 9. Summary

Environmental damage caused by the extraction of minerals, the exploitation of workers and natural resources in food production, and the presence of sweatshops in under-privileged countries to meet the ever-increasing demand for consumer products in developed nations, is the reality of today's world. Since it is often not possible to prosecute violations of human rights within the countries where they occur, it is worth considering how, if at all, these violations can be remedied from abroad in the countries where the food, clothes or myriad of other goods produced are sold to end-users. It is assumed that if the retailers of these products are liable for the violations, or they at least bear commercial consequences for the violations, such action will force manufacturers to improve the conditions under which those products are produced.

This paper has analysed how currently existent legal instrument could be used in practice in order to deal with the issue at hand. As to the Guiding Principles, it may be concluded that even if the second pillar may be interpreted in a way that obliges retailers to deal with human rights violations, the Guiding Principles do not

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84 Available at: <https://www.uvo.gov.sk/prehľad-rozhodnuti-podla-zakona-c-252006-z-z/document/-29> (1.01.2019).

85 Judgments of the Supreme Court of the Slovak Republic are published online on [www.nsud.sk](http://www.nsud.sk).

provide legal standing *per se*. In this regard, EU directives provide more explicit rights which might be used, however, their applicability in relation to human rights violations would very much depend on interpretation of the relevant provisions. The same applies to the Slovak acts of law referenced. Thus, even under current legislation it is possible, at least in theory, to hold the retailers of goods liable for violations of human rights incurred during the course of their production. Public procurement rules also provide limited scrutiny over human rights violations although here, the duty of contracting authorities to observe labour, environmental and social rules, is covered by more explicit provisions.

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